PETITION FOR WRIT OF CERTIORARI

85-2067

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE MENDOZA-LOPEZ AND
ANGEL LANDEROS-QUINONES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a defendant prosecuted under 8 U.S.C. 1326 for reentering the United States after having been deported may collaterally attack the validity of his deportation proceeding.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-7a) is reported at 781 F.2d 111. The opinion of the district court (App., *infra,* 8a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1985. A petition for rehearing was denied on March 18, 1986 (App., *infra,* 29a). On May 6, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 8 U.S.C. 1105a provides in pertinent part:

(a) * * * The procedure prescribed by, and all the provisions of chapter 158 of title 28 [review of orders of federal agencies] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [proceedings to determine deportability] or comparable provisions of any prior Act, except that—

* * * * *

(6) * * * if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title [supervision of deportable alien and penalty for willful failure to depart] only by separate motion for judicial review before trial * * * .

* * * * *

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

* * * * *

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

2. 8 U.S.C. 1326 provides:

> Any alien who–
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
>
> shall be guility of a felony, and upon conviction thereof, shall be punished by imprisonment of not more than two years, or by fine of not more than $1,000, or both.

STATEMENT

1. Respondents and 11 other aliens were found deportable at a joint deportation hearing before an immigration judge in October 1984. Respondents did not appeal the deportation order.[1] They were escorted across the border at El Paso and given a form that stated, in Spanish and English, that they would be subject to felony charges if they returned. Two months later, respondents were discovered in Lincoln, Nebraska. They were arrested and indicted for violating 8 U.S.C. 1326, which makes it a crime for any alien who "has been arrested and deported

[1] Respondents could have appealed the immigration judge's order to the Board of Immigration Appeals (8 C.F.R. 242.21) and then to a federal court of appeals (8 U.S.C. 1105a(a)).

or excluded and deported [to] * * * enter[], attempt to enter, or [be] found in, the United States" without the Attorney General's permission. App., *infra,* 9a.

The district court dismissed the indictments (App., *infra,* 27a, 28a). The court first ruled that a defendant in a prosecution under Section 1326 may collaterally attack the validity of the underlying deportation order (App., *infra,* 18a). It next determined that respondents were denied due process at their deportation hearing, because they had not been made aware that they could apply for suspension of deportation. The court acknowledged that the immigration judge had "technically" complied with the Immigration and Naturalization Service regulation requiring that the defendants be advised that they were eligible for suspension of deportation (App., *infra,* 22a).[2] The court stated, however, that its review of the hearing showed that "neither of the defendants in this case was in a position to evaluate [his rights] intelligently" (*ibid.*). The court went on to conclude that respondents were prejudiced because they might have obtained suspension of deportation had they been able to make an intelligent evaluation of the alternatives open to them (*id.* at 25a).

2. The court of appeals affirmed (App., *infra,* 1a-8a). It noted (*id.* at 2a) that in *United States* v. *Spector,* 343 U.S. 169, 172-173 (1952), this Court reserved the question whether a defendant can collaterally attack a deportation order and that the circuits are divided on the issue.[3]

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[2] The applicable regulation (8 C.F.R. 242.17(a)) provides that "[t]he special inquiry officer shall inform the respondent of his apparent eligibility to apply for any of the benefits enumerated in this paragraph [which include suspension of deportation] and shall afford him an opportunity to make application therefor during the hearing."

[3] The court listed (App., *infra,* 3a) *United States* v. *Petrella,* 707 F.2d 64 (2d Cir.), cert. denied, 464 U.S. 921 (1983); *United States* v. *Gonzalez-Parra,* 438 F.2d 694 (5th Cir.), cert. denied, 402 U.S. 1010 (1971); and *Arriaga-Ramirez* v. *United States,* 325 F.2d 857 (10th Cir.

The court then sided with those circuits that have permitted collateral attacks on deportation orders. The court held that "a material element of the offense prohibited by 8 U.S.C. § 1326 is a 'lawful' deportation and that, therefore, when prosecuting a section 1326 proceeding, the government must prove beyond a reasonable doubt that the defendant illegally entered the United States after being deported according to law" (App., *infra,* 3a).

The court rejected the government's contention that this issue is analogous to the issue presented in *Lewis* v. *United States,* 445 U.S. 55 (1980), where this Court held that a defendant in a prosecution for possession of a firearm by a felon could not collaterally attack the validity of his felony conviction. The court of appeals stated that "[i]n *Lewis* the prior decision was judicial, not administrative" and that "while it can be said that Congress had a legitimate interest in prohibiting the possession of firearms by those whose brushes with the law resulted only in invalid convictions, it cannot likewise be said that Congress intended to expel from this country all aliens, even those who have a legitimate right to be here" (App., *infra,* 2a-3a n.1).[4]

Judge Fagg, dissenting, noted that "Section 1326 clearly speaks only of the fact and not the quality of a previous deportation" (App., *infra,* 5a). He argued (*ibid.*) that just as the Court in *Lewis* held that Congress did not intend that courts should inquire into the lawfulness of felony convictions under the statute prohibiting possession of a

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1963), as not permitting collateral attack; it listed *United States* v. *Rosal-Aguilar,* 652 F.2d 721 (7th Cir. 1981), *United States* v. *Gasca-Kraft,* 522 F.2d 149 (9th Cir. 1975), and *United States* v. *Bowles,* 331 F.2d 742 (3d Cir. 1964), as permitting collateral attack.

[4] The court of appeals briefly addressed the question whether the district court was correct in holding that the deportation hearing was invalid. The court concluded that the district court had not clearly erred in that regard (App., *infra,* 4a).

firearm by a convicted felon, the court should not inquire into the lawfulness of previous deportations in prosecutions under Section 1326. Furthermore, he concluded (App., *infra,* 6a) that review of "the comprehensive scheme for judicial review that is available to aliens under 8 U.S.C. 1105a showed that Congress intended that aliens would not be permitted to challenge deportation orders during prosecutions for unlawful reentry (App., *infra,* 6a-7a). Finally, he noted that there is no constitutional impediment to barring aliens from collaterally attacking the validity of their deportation proceedings in prosecutions under Section 1326 (App., *infra,* 7a).

ARGUMENT

The court of appeals incorrectly decided a question of great importance to the administration of the immigration laws. As the court of appeals acknowledged (App., *infra,* 3a) there is a conflict in the circuits on the issue whether a defendant in a prosecution under Section 1326 may collaterally attack the validity of the underlying deportation order. The issue is important because the government brings a large number of prosecutions under Section 1326.[5] Permitting defendants in unlawful reentry cases to attack the validity of their deportation proceedings greatly complicates those prosecutions, which otherwise involve only the simple questions whether the defendant was deported and whether he was subsequently found in the United States without the Attorney General's permission. As the dissenting judge in the court of appeals stated, Congress has provided three "sole and exclusive" procedures for obtaining judicial review of the validity of a deportation proceeding, and review as part of a Section

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[5] The Immigration and Naturalization Service informs us that during 1985 United States Attorneys authorized 1,185 prosecutions under Section 1326.

1326 prosecution is not one of the three enumerated procedures. In these circumstances review of this recurring question is plainly warranted.[6]

1. There is a clear conflict in the circuits, as the court of appeals acknowledged (App., *infra,* 3a). The Second (*Petrella, supra,* note 3, 707 F.2d at 66-67), Fifth (*Gonzalez-Parra, supra* note 3, 438 F.2d at 697), and Tenth (*Arriaga-Ramirez, supra* note 3, 325 F.2d at 859) Circuits have held that collateral attacks on the validity of deportation hearings are not permitted in Section 1326 prosecutions. The Eighth Circuit in this case, along with the Ninth Circuit (*Gasca-Kraft, supra* note 3, 522 F.2d at 152), have permitted collateral attacks. The Third Circuit permits collateral attacks in a least some circumstances (*Bowles, supra* note 3, 331 F.2d at 750). And the Seventh Circuit has permitted limited collateral attacks on the underlying deportation proceedings (*Rosal-Aguilar, supra* note 3, 652 F.2d at 723). The conflict in the circuits is therefore now well established, and without this Court's intervention, it is likely to persist.[7]

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[6] We have not presented for this Court's review the question whether the district court erred in concluding that the deportation proceeding in this case was unlawful. We note nevertheless that the district court found only a "technical" violation of the required procedures (App., *infra,* 22a). Furthermore, contrary to the district court's conclusion, it is highly unlikely that respondents were prejudiced as a result of the immigration judge's failure to explore the possibility that they might qualify for suspension of deportation. Suspension of deportation is an extraordinary remedy that is seldom granted, and its requirements have been strictly applied. See *INS* v. *Rios-Pineda,* No. 83-2032 (May 13, 1985); *INS* v. *Phinpathya,* 464 U.S. 183 (1984); *INS* v. *Jong Ha Wang,* 450 U.S. 139 (1981).

[7] We suggested in our opposition to the petition for a writ of certiorari in *Petrella* (at 7) that the conflict might not persist because the circuits permitting collateral attack might be persuaded to change their position in light of this Court's decision in *Lewis.* The Court denied the petition in *Petrella* over two dissents. *Petrella* v. *United States,* cert. denied, 464 U.S. 921 (1983) (White & Blackmun, JJ.). It is now clear that the conflict has persisted in spite of *Lewis.* The Ninth

2. On the merits, we submit that the court of appeals erred in permitting respondents to attack the validity of their deportation hearing in a prosecution for reentering the United States. Section 1326 provides that it is a crime for an alien to reenter the United States without the permission of the Attorney General after having been deported. The statute says nothing about the validity of the order that authorized the alien's prior deportation. There is therefore nothing in the language of Section 1326 to suggest that the validity of the prior deportation proceeding is, in effect, an element of the offense.

The provision of the Immigration and Nationality Act that deals expressly with judicial review of deportation orders (8 U.S.C. 1105a) provides strong support for the view that Congress did not intend to permit collateral attacks on the validity of deportation hearings in Section 1326 prosecutions. Section 1105a(a) provides that the procedure under which orders of federal agencies are reviewed in the federal courts of appeals (see 28 U.S.C. 2341 *et seq.*) is the "sole and exclusive procedure for * * * judicial review of all final orders of deportation." Thus, an alien may obtain review of a deportation order by exhausting his administrative remedies and filing a petition for review within six months of the date of the final deportation order (8 U.S.C. 1105a(a)(1)).

Section 1105a provides only two exceptions to the rule that review of the deportation order in the court of appeals is the sole and exclusive method judicial review. The first exception, found in Section 1105a(a)(9), provides that an alien "held in custody pursuant to an order of deportation may obtain judicial review * * * by habeas corpus pro-

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Circuit has recently reaffirmed its rule permitting collateral challenges to deportation proceedings (*United States* v. *Nicholas-Armenta*, 763 F.2d 1089, 1090 (1985)), and the Eighth Circuit in this case has adopted the Ninth Circuit's approach.

ceedings." The second exception, which is codified in Section 1105a(a)(6), provides that an alien who fails to depart may collaterally attack the validity of his deportation order in a prosecution under 8 U.S.C. 1252(d) for failure to depart after being ordered to do so. That exception makes it clear that Congress knew how to permit collateral attacks on the validity of deportation proceedings in criminal prosecutions. The fact that Congress did not provide an exception in the case of prosecutions for reentering the United States in violation of Section 1326, while it did in the case of prosecutions for failure to depart in violation of Section 1252(d), makes it all the more clear that it did not intend to permit collateral attacks in unlawful reentry cases.[8]

Contrary to the suggestion of the court of appeals (App., *infra,* 4a), prohibiting collateral attacks on deportation proceedings in Section 1326 prosecutions does not violate due process. In *Lewis,* the Court held that Congress could constitutionally focus "on the mere fact of conviction, regardless of the validity of the conviction, as a way to keep firearms away from potentially dangerous persons" (445 U.S. at 67). The Court noted that a convicted felon could "challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm" (*ibid.*). In the case of deported aliens, Congress could rationally determine to limit the elements of the criminal offense to (1) a reentry into the United States, (2) without the Attorney General's permission, (3) by a previously deported alien. Like a convicted felon, an alien who is subject to a deportation order has alternative

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[8] Another portion of the judicial review statute (8 U.S.C. 1105a(c)) provides that an "order of deportation or of exclusion shall not be reviewed by any court if the alien.* * * has departed from the United States after the issuance of the order." It is difficult to see how Congress could have made it any clearer that it did not intend to permit collateral attacks on the validity of deportation proceedings except where such challenges were specifically authorized.

avenues for obtaining relief. He may challenge the validity of the deportation order in the ways enumerated in Section 1105a or he may attempt to obtain the Attorney General's permission before reentering the United States.

The statutory scheme is not unconstitutional on the ground that the primary method for challenging deportation orders—through review by a court of appeals of a final order of deportation (8 U.S.C. 1105a(a))—is a civil proceeding. In *Yakus* v. *United States,* 321 U.S. 414, 443-446 (1944), the Court upheld the Emergency Price Control Act against a similar constitutional challenge. The Act provided that a person subject to a maximum price regulation could challenge its validity only through a civil proceeding; a defendant could not challenge the validity of a maximum price regulation in a criminal proceeding for violating the regulation. The Court found no constitutional infirmity in that statutory scheme. In reaching that conclusion, the Court stated (321 U.S. at 444) that there is "no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administration regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity."

Despite the holding in *Yakus,* the dissenters in *Spector* contended that the Constitution requires that an alien be shown to be deportable before he can be convicted of unlawfully failing to depart (343 U.S. at 177-180). Some of their concerns, however, were addressed by Congress when it subsequently enacted Section 1105a. First, at the time *Spector* was decided it was not clear that deportation orders could be subjected to judicial review (see 343 U.S. at 179 (Jackson & Frankfurter, JJ., dissenting)); Section 1105a(a) now makes it clear that deportation orders are reviewable by the courts of appeals. Second, the dissenters in *Spector* were concerned that some aliens ordered deported might not find a country that would accept them

(343 U.S. at 179-180) (Jackson & Frankfurter, JJ.)); because Section 1105a(a)(6) authorizes judicial review of the validity of a deportation order in the case of an alien who is prosecuted for failing to leave the country, an alien who cannot find a country that will accept him can obtain judicial review of the validity of the deportation order even if he has not pursued an appeal under Section 1105a(a).

There is, therefore, no constitutional principle requiring that "a deported alien who fails to invoke the procedures of 8 U.S.C. § 1105a be permitted to contest the factual basis for the deportation order after he has reentered the country" (*Gonzalez-Parra,* 438 F.2d at 699). For that reason, there is no need to avoid a difficult constitutional issue by construing Section 1326 to require the government to prove as an element of the crime of unlawful reentry that the defendant was "lawfully" deported.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1436

UNITED STATES OF AMERICA, APPELLANT,

VS.

JOSE MENDOZA-LOPEZ, APPELLEE.

No. 85-1437

UNITED STATES OF AMERICA, APPELLANT,

VS.

ANGEL LANDEROS-QUINONES, APPELLEE.

Appeals from the United States District Court for the District of Nebraska.

Submitted: September 11, 1985

Filed: December 31, 1985

Before HEANEY, JOHN R. GIBSON and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

The United States appeals from the dismissal of the indictments against two illegal immigrants in this 8 U.S.C. § 1326 proceeding. For the reasons set forth below, we affirm.

BACKGROUND

Jose Mendoza-Lopez and Angel Landeros-Quinones were illegal immigrants from Mexico. They lived in the United States for more than seven years when they were picked up by agents of the Immigration and Naturalization Service in Nebraska. After a hearing at which they were not represented by counsel, they were deported. Six weeks after deportation, they were arrested in Lincoln, Nebraska, on charges of re-entry without authorization under 8 U.S.C. § 1326.

At trial, defendants moved to suppress evidence of their deportation. The government argued that the motion amounted to an impermissible collateral attack on deportation orders, and that, nevertheless, the defendants' constitutional rights had not been violated. The district court concluded that defendants could attack the deportation procedure and that the lack of legal counsel at the deportation hearing, combined with the defendants' inability to understand the proceedings, violated the concept of fundamental fairness. The unlawful presence charges were dismissed. On appeal, the government argues that the trial court erred by permitting the defendants to collaterally attack their deportation orders and, in any event, that the defendants were afforded due process at the deportation hearing.

DISCUSSION

The Supreme Court has expressly reserved the question of whether a defendant can collaterally attack a deportation order. *United States v. Spector*, 343 U.S. 169 (1952).[1]

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[1] The government argues that the Supreme Court's intent to prohibit collateral attacks in section 1326 proceedings was made apparent in *Lewis v. United States*, 445 U.S. 55 (1980). In *Lewis*, the Court held that the defendant, in a prosecution for possession of a firearm by a felon, could not collaterally attack his prior conviction, even though

The United States Circuit Courts which have addressed this issue are split. The more restrictive view is found in the Tenth, Fifth and Second Circuits. *See Arriaga-Ramirez v. United States*, 325 F.2d 857 (10th Cir. 1963); *United States v. Gonzalez-Parra*, 438 F.2d 694 (5th Cir. 1971); *United States v. Petrella*, 707 F.2d 64 (2d Cir. 1983). These courts reason that since Congress has provided three separate avenues for appeals of administrative deportation findings, *see* 8 U.S.C. § 1105a, it intended to foreclose the possibility of collateral attack on such orders in section 1326 prosecutions. The Ninth, Third and Seventh Circuits, on the other hand, permit collateral attacks on deportation orders. *See United States v. Bowles*, 331 F.2d 742 (3rd Cir. 1964); *United States v. Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975); *United States v. Rosal-Aguilar*, 652 F.2d 721 (7th Cir. 1981). These courts reason that a material element of the offense prohibited by 8 U.S.C. § 1326 is a "lawful" deportation and that, therefore, when prosecuting a section 1326 proceeding, the government must prove beyond a reasonable doubt that the defendant illegally entered the United States after being deported according to law. *Gasca-Kraft*, 522 F.2d at 152. Under this reasoning, the defendant must be able to contest the lawfulness of the deportation in the section

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the court assumed that the conviction was the result of an uncounseled guilty plea. The Court relied upon the language of the statute itself, noting that the prior conviction was not required to be "valid," and the statutory history, which disclosed an intent by Congress to enact "a sweeping prophylaxis, in simple terms, against misuse of firearms." *Id.*, 445 U.S. at 63.

Lewis is not controlling. In *Lewis* the prior decision was judicial, not administrative. Moreover, while it can be said that Congress had a legitimate interest in prohibiting the possession of firearms by those whose brushes with the law resulted only in invalid convictions, it cannot likewise be said that Congress intended to expel from this country all aliens, even those who have a legitimate right to be here.

1326 proceeding. We agree with this rationale. Allowing a pretrial review of the underlying deportation to examine whether due process was provided insures fundamental fairness to the rights of the criminal defendant. Accordingly, we conclude that defendants in section 1326 prosecutions may collaterally attack their previous deportation orders on the ground that they were not accorded due process at the deportation hearing.

The next question is whether the district court erred in finding a due process violation. Our review of the record reveals that the district court's conclusion is not clearly erroneous.

Both defendants had been continuously present in the United States for a period exceeding seven years at the time of the deportation hearing. They were therefore eligible for suspension of deportation. The Immigration Law Judge (ILJ) did not adequately inform the defendants about this alternative relief, as is required by 8 C.F.R. § 242.17(2). The defendants did not understand the consequences of the choices that they were forced to make. Had they been fully aware of such consequences, there is a substantial likelihood that the result of the hearing would have been "materially affected." Therefore, the defendants demonstrated prejudice from the ILJ's failure to fully comply with the provisions of 8 C.F.R. § 242.17. Because the defendants did not fully understand the proceedings, the hearing was fundamentally unfair, and the deportation order was obtained unlawfully. Thus, it cannot stand as a material element forming the basis of the charges against the defendants. The indictments were properly dismissed. Accordingly, we affirm.

FAGG, Circuit Judge, dissenting.

I respectfully disagree with the court's determination that an alien can attack collaterally a previous deportation order as a defense to a prosecution under 8 U.S.C. § 1326.

I would reverse the order of the district court dismissing the indictment against Mendoza-Lopez and Landeros-Quinones. In my view, aliens may not challenge deportation orders in section 1326 prosecutions because the "sole and exclusive procedure" for obtaining judicial review of deportation orders is embodied in the comprehensive review provisions of 8 U.S.C. § 1105(a). Although the court gives short shrift to *Lewis v. United States*, 445 U.S. 55 (1980), *ante* at 3, I believe the *Lewis* analysis is indeed supportive of the government's view.

The starting point in the interpretation of any statute is the language of the statute itself. *Lewis*, 445 U.S. at 60. Section 1326 clearly speaks only of the fact and not the quality of a previous deportation. "Any alien who—(1) has been arrested and deported * * * and thereafter (2) enters * * * the United States [without the consent of the Attorney General] shall be guilty of a felony." 8 U.S.C. § 1326. "The lack of any express reference to the validity of the deportation or of the arrest indicates that the statute seeks to punish the unauthorized reentry of an alien previously deported, regardless of whether the deportation was 'lawful.' " *United States v. Petrella*, 707 F.2d 64, 66 (2d Cir.), *cert. denied*, 464 U.S. 921 (1983). *Cf. Lewis*, 455 U.S. at 60 ("No modifier is present, and nothing suggests any restriction on the scope of the term [deported].")

Despite the plain language of the statute, the court today adopts the position that a *lawful* deportation is a material element of a section 1326 offense. Although an ambigous criminal statute should be resolved in favor of lenity, *see Rewis v. United States*, 401 U.S. 808, 812 (1971), in the interpretation of an unambiguous statute "any principle of lenity * * * has no application." *Lewis*, 445 U.S. at 65.

The legislative history of section 1326 is barren of any suggestion that Congress was willing to allow a defendant to question the validity of a prior deportation order in a

section 1326 prosecution. *See* H.R. Rep. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1724. In addition, my reading of section 1105a and its legislative history leads me to the conclusion that Congress intended to bar collateral attacks on deportation orders in prosecutions under 8 U.S.C. § 1326. Section 1105a was enacted in response to congressional concern over the inability to enforce effectively the deportation provisions of the immigration laws due to frivolous and repetitive attacks on deportation orders. *See* H.R. Rep. No. 1086, 89th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Ad. News 2950, 2967. "The purpose of section 5 [of the amendment] is to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States, by adding a new section [1105a] to the Immigration and Nationality Act." *Id.* at 2966.

Section 1105a expressly supplies the "sole and exclusive" procedures available to aliens who have not yet departed from the United States "to obtain judicial review of all final orders of deportation." 8 U.S.C. § 1105(a). Under the statutory framework an alien may obtain judicial review in several ways. *Cf. Lewis*, 455 U.S. at 64 ("[I]t is important to note that an [alien ordered deported] is not without relief."). First, an alien may obtain civil review of a deportation order in the federal courts of appeals. 8 U.S.C. § 1105a(a). Second, an alien in custody may obtain habeas corpus review. 8 U.S.C. § 1105a(a)(9). Finally, aliens prosecuted under 8 U.S.C. § 1252(d) (violation of supervisory regulations) or 8 U.S.C. § 1252(e) (willful failure of an alien to depart) may challenge the validity of deportation orders in pretrial motions. 8 U.S.C. § 1105a(a)(6).

After reviewing the comprehensive scheme for judicial review that is available to aliens under section 1105a, the Second Circuit and the Fifth Circuit have concluded that

aliens are not permitted to challenge deportation orders during prosecutions for unlawful reentry under section 1326. *See United States v. Petrella*, 707 F.2d at 66 ("[N]either the statute on its face nor the statutory scheme for review of deportation orders authorizes a challenge to the original deportation. We conclude, therefore, that Congress intended to bar collateral attacks in § 1326 prosecutions."); *United States v. Gonzalez-Parra*, 438 F.2d 694, 697 (5th Cir.) ("We think it clear that Congress intended to bar collateral attacks on deportation orders in prosecutions under 8 U.S.C. § 1326."), *cert. denied*, 402 U.S. 1010 (1971).

Nor do I see any constitutional impediment to the view expressed in this dissent. First, the focus of section 1326 on the mere fact of deportation and unlawful reentry is rational in light of the congressional purpose to streamline judicial review of deportation orders. Second, the statutory scheme does provide a comprehensive, albeit exclusive, format for judicial review of deportation orders. Therefore, an alien subject to deportation has an opportunity outside of section 1326 to challenge the validity of the order. *See Lewis*, 455 U.S. at 65-67; *see also United States v. De La Cruz-Sepulveda*, 656 F.2d 1129, 1132 (5th Cir. 1981).

Because section 1105a provides the "sole and exclusive" method for obtaining judicial review of deportation orders, I would hold that an alien may not challenge a deportation order in his section 1326 prosecution. Therefore, I would reverse the district court's dismissal of the indictments against Mendoza-Lopez and Landeros-Quinones.

APPENDIX B

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR85-L-06

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ANGEL LANDEROS-QUINONES, DEFENDANT.

CR85-L-07

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JOSE MENDOZA-LOPEZ, DEFENDANT.

[Filed Feb. 28, 1985]

MEMORANDUM

Defendants in these criminal prosecutions have filed motions for judicial review and to dismiss the indictments against them, as well as motions to suppress evidence, all stemming from the prior administrative adjudications of the Immigration and Naturalization Service (INS), finding the defendants deportable under the nation's immigration laws, and in fact resulting in the defendants' deportation. Defendants contend that this court should allow the defendants to collaterally attack their prior administrative adjudications and the procedures utilized by INS in reaching the deportation decision, because they are material elements of the offense with which the defendants now stand charged, violation of Title 8 U.S.C. § 1326,

commonly referred to as illegal entry following deportation.

Each of the defendants was arrested at a separate location on October 23, 1984 by agents of INS upon a belief that each was an alien in this country illegally. Both defendants were transported to Denver, Colorado on October 30, 1984, on which date a deportation hearing was held before an Immigration Judge. The hearing was held on a group basis, there being thirteen persons appearing before the Immigration Judge at the same time, including these defendants. Warrants of Deportation were issued on October 31, 1984, ordering each of the defendants deported. The warrants were executed November 1, 1984. The parties appear to have stipulated that each defendant was served, at the time of his deportation, with an INS form I-294 (although the copy of the form for defendant Mendoza-Lopez is not attached to the stipulation), by which each defendant was advised in both Spanish and English that his return to the United States following his deportation, without permission, would constitute a felony offense. On December 12, 1984 both defendants were again arrested at separate locations in Lincoln, Nebraska. The defendants were thereafter indicted by the grand jury sitting in this district upon charges of violating 8 U.S.C. § 1326. That statute provides:

> Any alien who—
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in the United States, unless (A) prior to his reembarkation at a place outside of the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for

> admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act.
>
> shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by fine of not more than $1,000, or both.

Thus, the defendants' motions raise two issues; first, whether collateral attack of the administrative decisions of deportability should be allowed in a subsequent criminal prosecution under 8 U.S.C. § 1326; and second, if so, whether the deportation orders entered in each of these cases can properly form the basis of the offenses with which these defendants now stand charged.

The Supreme Court of the United States, in *United States* v. *Spector,* 343 U.S. 169 (1952), has declined to consider the collateral attack issue. Although it was raised in that case, a criminal prosecution for an alien's failure to take steps to depart the country, having been ordered to do so, the court decided the case on other grounds, and did not consider the collateral attack issue. Dissenting, Justices Jackson and Frankfurter sounded the theme later heard in circuit courts considering the issue:

> This Act creates a crime also based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure. The Act does not permit the court which tries him for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no in-

quiry into the correctness or validity of the order is permitted.

The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. We must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom.

* * *

The adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime. It is not made either by a jury trial or a court decision. All that is required by statute is a hearing before an administrative officer and that may be before one who acts both as the alien's judge and prosecutor. The finding that the alien is guilty of conduct subjecting him to deportation does not require proof beyond reasonable doubt but may be made on mere preponderance of evidence. If the determination of deportability is subject to review under § 10 of the Administrative Procedure Act, . . ., an evidentiary attack raises only the question whether on the record as a whole there is substantial evidence in support of

the order. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474.

* * *

343 U.S. at 177-179 (Jackson, J., dissenting) (footnotes omitted).

The courts of appeals have considered the issue of whether a defendant in a criminal prosecution under 8 U.S.C. § 1326 should be permitted to collaterally attack his earlier deportation order.[1] The more restrictive views are found in cases decided by the Tenth, Fifth, and Second Circuits. *See United States v. Petrella,* 707 F.2d 64 (2nd Cir. 1983); *United States v. De La Cruz Sepulveda*, 656 F.2d 1129 (5th Cir. 1981); *United States v. Gonzalez-Parra*, 438 F.2d 694 (5th Cir. 1971), *cert. denied* 402 U.S. 1010 (1971); *Arriaga-Ramirez v. United States,* 325 F.2d 857 (10th Cir. 1963). In *Gonzalez-Parra, supra*, the court analyzed the congressional scheme set forth in the Immigration and Nationality Act, concluding that by providing three separate avenues for appeals of administrative deportation findings, congress intended to foreclose the possibility of collateral attack on such orders in § 1326 prosecutions. In *Petrella, supra,* the Second Circuit followed the reasoning of the Fifth Circuit in *Gonzalez-Parra*, and further rejected the idea that the court should inquire whether the deportation order was "lawful," analogizing the situation to a charge under 18 U.S.C. § 751 for escape from imprisonment brought against a defendant serving a sentence claimed to be invalid. 707 F.2d at 66, n.2. I note that in both *Petrella* and *Gonzalez-Parra*, the defendants had been represented by counsel at the prior deportation proceedings. This is not clear in *Arriaga-Ramirez.* In that case the Tenth Circuit Court of Appeals rejected the possibility of collateral attack in a

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[1] See, "Collaterally Attacking Deportation Orders in Criminal Prosecutions for Illegal Reenry under Section 276 of the Immigration and Nationality Act of 1952," 56 Notre Dame Lawyer 677 (April 1981).

prosecution under 8 U.S.C. § 1326, without discussion, relying upon two prior cases precluding such attacks in civil, redeportation proceedings.[2]

Other circuit courts have permitted defendants in § 1326 prosecutions to attack, to varying degrees, the underlying deportation orders. In *United States v. Rosal-Aguilar*, 652 F.2d 721 (7th Cir. 1981) the circuit court affirmed the denial of a *de novo* hearing on the merits of the deportation, but approved the district court's review of the deportation proceedings on the proposition that "the government must prove the underlying deportation to have been based on a valid legal predicate and obtained according to law." 652 F.2d at 723 (citations omitted). In *United States v. Bowles*, 331 F.2d 742 (3rd Cir. 1964) the circuit court permitted collateral attacks on underlying deportation orders insofar as to examine both the factual and the legal bases for such orders. 331 F.2d at 750.

The most extensive case law in this area has emanated from the Ninth Circuit. There, in *United States v. Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975), in a prosecution under 8 U.S.C. § 1326, the court held that a material element of the offense therein defined is a *lawful* deportation. 522 F.2d at 152. The court relied upon *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968) (which, in turn, relied upon *United States v. Bowles, supra*), for the proposition that the government must prove that the accused entered the United States "after being deported according to law." 331 F.2d at 750. *See also United States v. Heikkinen,* 221 F.2d 890, 892 (7th Cir. 1955). In *Gasca-Kraft*, however, the defendant failed to show that he was entitled to appointed counsel in his defense at the deportation hearing since it was a civil proceeding, thus failing in

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[2] *United States ex rel Rubio v. Jordan*, 190 F.2d 573 (7th Cir. 1951); *United States ex rel Bartsch v. Watkins,* 175 F.2d 245 (2nd Cir. 1949).

his attempt to demonstrate that the deportation order was unlawful. Later, in *Mendez v. Immigration and Naturalization Service*, 563 F.2d 956 (9th Cir. 1977), a civil appeal of a deportation order, that circuit rejected the INS contentions that the alien's appeal was barred by 8 U.S.C. § 1105(a) [3] and 8 U.S.C. § 1101(g).[4] The court held that the statutes' use of the term "departed" implied a requirement that the departure not be in contravention of procedural due process, and that it be a "legally executed" departure when effected by the government. 563 F.2d at 958. The Ninth Circuit thus rejected the reasoning found persuasive by the Fifth and Second Circuits, *see Petrella, supra; Gonzales-Parra, supra.* This position was reaffirmed in *United States v. Barraza-Leon*, 575 F.2d 218 (9th Cir. 1978), and was expanded upon by the court in *United States v. Calderon-Medina*, 591 F.2d 529 (1979), following remand, 617 F.2d 529 (9th Cir. 1980), in which that court held that the violation of a regulation of the INS may invalidate a deportation proceeding if the regulation serves a purpose of benefit to the alien, and if its violation prejudiced interests of the alien which were so protected. 591 F.2d at 531.

The Eighth Circuit Court of Appeals has not spoken directly to this issue. In *Hernandez-Uribe v. United States,* 515 F.2d 20 (8th Cir. 1975), *cert. denied* 423 U.S. 1057

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[3] 8 U.S.C. § 1105(a) states in part: "(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.* * *"

[4] Quoting 8 U.S.C. § 1101(g). "For the purposes of this chapter any alien ordered deported (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed."

(1976), the defendant challenged the use of collateral estoppel against him by the government's showing his previous two convictions under 8 U.S.C. § 1326, as precluding his opportunity to challenge the instruction to the jury that the defendant was in fact an alien as of the date of this guilty plea to one of the previous charges. The court relied upon the reasoning of *Pena-Cabanillas, supra,* in approving the use of collateral estoppel in this circumstance. In doing so, it quoted the language of *United States v. Rangel-Perez*, 179 F.Supp. 619 (S.D. Cal. 1959), which had also been quoted by the *Pena-Cabanillas* panel. That language, while rejecting the proposition that a defendant could relitigate the issue of alienage established in a previous criminal proceeding, included the following:

> Of course the defendant is entitled to have tried anew each time the facts as to his entry and its justification on other grounds (see 8 U.S.C.A. § 1326) as well as any change of nationality status since the prior adjudication. And it is equally beyond question that the accused is always entitled to have any prior proceedings carefully examined in order to determine surely whether a prior adjudication of alienage was made after a full and adequate hearing, and was essential to a determination of the case.

515 F.2d at 22, quoting 394 F.2d at 787-788. The Eighth Circuit went on to comment that the defendant's guilty plea, by which he waived his right to a trial, also waived his

> opportunity to contest the determination of alienage in that case on the same basis as alleged here. He there had a right to a jury trial in which he could have presented any evidence he had pertaining to the place of his birth.

515 F.2d at 22. It is unclear whether this language is intended to be a recitation of the Ninth Circuit law as

discussed above, or an indication that in the Eighth Circuit defendants in § 1326 prosecutions have a right to a *de novo* review of the factual basis underlying the original deportation order. It appears to me that the approved quotation in *Hernandez-Uribe* indicates in this circuit a posture to allow at least some degree of collateral attack upon prior deportation orders. To determine whether the prior deportability adjudication was after "a full and adequate hearing" requires examination of whether applicable constitutional, statutory, and regulatory procedures were followed.[5]

The government argues that the case of *Lewis v. United States*, 445 U.S. 55 (1980) forecloses a collateral attack on prior administrative deportation decisions. In *Lewis* the Court held that a defendant in a prosecution for possession of a firearm by a felon, could not collaterally attack his prior conviction, even though the court assumed that the conviction was the result of an uncounseled guilty plea. The Court relied upon the language of the statute itself, noting that the prior conviction was not required to be "valid," and the statutory history, which disclosed an intent by Congress to enact "a sweeping prophylaxis, in simple terms, against misuse of firearms." 445 U.S. at 63. The defendant's challenge on equal protection grounds was also rejected, the Court reasoning that Congress had

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[5] *See also United States v. Cabrera-Quintero*, 650 F.2d 942 (8th Cir. 1981) where the Eighth Circuit rejected a challenge under 28 U.S.C. § 2255 to a § 1326 conviction on the basis of an allegedly invalid prior deportation order:

> We hold that the validity of the original deportation is not a matter that is cognizable under § 2255. . . . Whether the validity of the original deportation could have been raised on direct appeal is another question."

650 F.2d at 843.

made a rational choice in deciding to prevent all felons, even those whose convictions were invalid, from possessing firearms.

I do not find *Lewis* controlling in this instance for essentially three reasons. First, the obvious difference in context is significant. While it might be said that Congress has been alarmed by this nation's inability to control its borders, there is no indication that the degree of that alarm matches that which caused Congress to enact the Omnibus Crime Control and Safe Streets Act of 1968, the Act involved in the *Lewis* case. Second, the prior decision here is administrative, not judicial. It is important to note that even while the *Lewis* Court assumed that the defendant's prior conviction was uncounseled it took note of the fact that the defendant's legal disability followed a criminal conviction, that is, a judicial proceeding. The court also noted that the Omnibus Act also prohibited possession of firearms even by persons who were under indictment (18 U.S.C. § 922(h)(1)), thus raising the implication that the disability applied determination of probable cause that the individual had committed a felony. Third, and most important, there is a striking difference in the interests at stake. While it might be said, as did the Supreme Court in *Lewis*, that Congress had a legitimate interest in prohibiting the possession of firearms by those whose brushes with the criminal justice system resulted only in invalid convictions, it cannot likewise be said that Congress intended to expel from this country all aliens, even those who have a legitimate right to be here. These differences appear to me to override any similarities between *Lewis* and the present matter, and I have found no authority, and have been cited to none, which applies *Lewis* in this context.

I find the reasoning of the Third, Seventh, and Ninth Circuits to be persuasive, at least insofar as the reasoning allows defendants in § 1326 prosecutions to challenge, on

constitutional, statutory and regulatory grounds, the procedures utilized in their previous deportation adjudications, and to allow such challenges by way of judicial review of the proceedings, prior to the criminal trial. A trial *de novo* of deportability issues does not appear necessary or appropriate. The factual circumstances in these cases—actual deportation of unrepresented aliens only two days following the deportation hearing—further demand that the court examine the defendants' claims.

For these reasons I conclude that the defendants in these § 1326 prosecutions may collaterally attack their previous deportation orders, at least to the extent of raising the grounds set forth in their motions.

II

The defendants claim that they were prejudicially denied due process in their deportation hearings by the failure of the Immigration Law Judge to inform them adequately of their right to retained counsel at the hearing, resulting in their unintelligently waiving that right; and further, that they were denied due process by the Immigration Law Judge's ordering deportation when they were eligible for "suspension of deportation" under 8 U.S.C. § 1254.

Although deportation proceedings are civil and thus not subject to all procedural safeguards accompanying criminal trials, *Whetstone v. INS,* 561 F.2d 1303, 1306 (9th Cir. 1977), such proceedings nevertheless must be conducted in accordance with due process standards. *Nee Hao Wong v. INS,* 550 F.2d 521, 523 (9th Cir. 1977). While this standard does not require the appointment of counsel in deportation proceedings, *United States v. Gasca-Kraft, supra,* 8 U.S.C. § 1252(b)(2) requires that the alien in a deportation proceeding be advised of his right to counsel at no expense to the government, and the manner of obtaining counsel or notifying the alien of his

right to counsel at no expense to the government, and the manner of obtaining counsel or notifying the alien of his right to obtain counsel has been regarded as fundamental, a denial of which is inherently prejudicial. *See e.g. Castaneda-Delgado v. Immigration and Naturalization Service,* 525 F.2d 1295 (7th Cir. 1975); *see also Partible v. INS,* 600 F.2d 1094 (5th Cir. 1979).

The defendants contend that their due process rights were violated when the Immigration Law Judge failed to inform them adequately of their right to counsel. I have reviewed the tape recording of the hearing held before the Immigration Law Judge on October 30, 1984. In addition, I have compared the hearing tape with the unofficial transcript provided by defense counsel. At the commencement of the hearing the Immigration Law Judge inquired of the thirteen aliens present at the hearing whether they had received a list of free legal services available. Initially, all thirteen indicated that they had received such a list, but later five of them indicated they had not received such a list of available legal services in Colorado. The tape indicates that such lists were immediately given to those five (unspecified) aliens. Later, the court advised the aliens present that they were entitled to have representation at the hearing by an attorney at law of their own choice, or by any other person or organization that is authorized and qualified to practice before the immigration court, or, that they could represent themselves at the hearing. As a group, the thirteen respondents indicated that they understood this right, that none of them had made arrangements for representation and that none of them wished to postpone the hearing in order to obtain counsel. The court then instructed the respondents that if any of them did not understand any of the proceedings, to raise their hands and their misunderstandings would be addressed so as to eliminate any confusion. Again, as a group, all indicated an understanding of that arrangement. Later all of the thirteen respondents were sworn and each, including these defendants, admitted each of the

allegations in the orders to show cause why they should not be deported (*see* filing 22).

There has been no showing made by either defendant that he did not understand that he had a right to counsel in these proceedings, albeit retained counsel of his own choosing. Nor is there any argument that either of them was prejudiced by the manner in which the Immigration Law Judge notified him of his right to retained counsel. I therefore conclude that the defendants have failed to demonstrate that their rights under the due process clause, or under the statutes, were violated by this factor standing alone.

Defendants also contend, however, that the Immigration Law Judge failed to advise them properly of their eligibility to apply for suspension of deportation, particularly when they were unrepresented, such that their waivers of that opportunity cannot be found to be knowing and intelligent thus violating their rights to due process. In this matter, the record is less clear.

In *Barraża-Leon, supra,* the Ninth Circuit Court of Appeals held that an Immigration Law Judge was not required by the applicable regulation[6] to inquire into the factual circumstances of the defendant's alleged eligibility for suspension of deportation, when the defendant's assertions of eligibility were not credible so as to make his eligibility "apparent" within the meaning of the regulation. In *Pargible, supra,* on the other hand, in a civil appeal from the Board of Immigration Appeals, the Fifth Circuit found that a waiver of counsel by an alien respondent was not understandingly made when she was not aware of the arguments that could have been made in her behalf, arguments which, the court concluded, might well have resulted in relief from deportation.

The record is clear that the Immigration Law Judge was aware of the fact that both defendants in this case had

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[6] 8 C.F.R. § 242.17(a).

been continuously present in the United States for a period exceeding seven years at the time of the deportation hearing. It is not at all clear, however, that his explanation of avenues of relief from deportation was understood by these defendants. For example, at one point the judge apparently addressed the wrong respondent regarding eligibility for suspension of deportation. At another point the judge did not answer one of the respondents' questions regarding bond and how that might affect application. Neither the unofficial transcript nor the tape indicates which of the defendants was making inquiry of the judge regarding the timing of such an application, and in response, the judge was not clear whether he would allow the defendants ten days or five days to make application for this relief. In addition, after Mr. Mendoza stated that he wanted to be a resident of the United States, the judge stated, "You what? You can apply for it [at which point the judge paused for laughter in the courtroom], but you have got to establish that you are eligible to get that classification." Shortly thereafter, Mr. Mendoza stated that he did not want to apply for the relief of suspension of deportation. Mr. Landeros questioned the judge about getting released on bond and voluntary departure in response to the judge's explanation concerning suspension of deportation; this discussion indicated a lack of understanding by Mr. Landeros of the whole idea of suspension of deportation.

The discussion with the two defendants here by the Immigration Law Judge in contrast with his discussion with two other of the respondents who requested consideration for voluntary departure as an alternative to deportation. The judge engaged each of them in an extensive period of questioning with the attorney for INS, to establish their eligibility for that relief, eventually granting it to one of them. Although at least defendant Mendoza stated explicitly that he was interested in suspension of deporta-

tion, no such inquiry was conducted with respect to that request. Regarding Mr. Landeros, although he did not actually state that he wished to apply for suspension of deportation, his earlier questioning of the judge indicates some interest in applying for some relief from deportation, and the record is sufficient to establish that Mr. Landeros did not fully understand the relief of suspension of deportation.

8 C.F.R. § 242.17(a) provides in part:

> The special inquiry officer shall inform the respondent of his *apparent eligibility* to apply for any of the benefits enumerated in this paragraph and shall afford him an opportunity to make application therefor during the hearing.

Other than *Barraza-Leon, supra*, I have found no case law interpreting this regulation. In this case, however, the record is clear that, technically at least, the Immigration Law Judge did comply with this requirement. Substantively however, it is clear that the purpose of the requirement is to afford respondents in deportation hearings an opportunity to understand their options and to make intelligent choices given the alternatives available to them. The tape recorded hearing is abundantly clear that neither of the defendants in this case was in a position to evaluate intelligently the remarks of the Immigration Law Judge as they pertained to "relief" from deportation. Their waivers of their opportunities to apply for suspension of deportation, therefore, cannot be found to be knowing and intelligent under the circumstances.

In addition to the above, the tape recording of the hearing indicates that the respondents in this joint hearing were offered at most only a few minutes to decide whether they wished to appeal the Immigration Law Judge's rulings in their respective cases, when he inquired of them whether they wished to accept his ruling, appeal his ruling, or reserve decision. Each of the thirteen respondents stated

that he accepted the judge's ruling. While, again, this may comply with the technical requirements of the applicable regulations, one is left, after listening to the tape recording, with the impression that the respondents' waivers of their appeal rights so quickly were not the result of considered judgments on their parts. Although these defendants have not raised that matter specifically, they have raised the question of "fundamental fairness" in the adjudicatory proceedings. In light of their claimed eligibility for suspension of deportation, discussed below, I find it inconceivable that they would so lightly waive their rights to appeal, and thus to the relief they now claim entitlement, if they had been fully apprised of the ramifications of such a choice.

As noted above, the government has the burden of proving that the antecedent deportation order issued in each of these cases was "lawful." Because of the deficiencies described above, I find that it was not.

That does not end the matter, however. The Ninth Circuit cases have held that the defendant has the burden of demonstrating prejudice resulting from the failure of INS to abide by applicable law. *United States* v. *Calderon-Medina, supra.*

It is doubtful that, had counsel appeared with either of these defendants, the Immigration Law Judge's finding of deportability would have been changed in any respect. Both of these defendants admitted the allegations in the respective orders to show cause issued against them, and there is nothing in the record, nor is it argued, that these findings were not correct.

The defendants attempt to demonstrate that they were prejudiced by the manner in which the deportation hearing was conducted by arguing that they were eligible for suspension of deportation, and by offering the affidavit of an attorney who has represented clients in such applications which states that in her opinion, these defendants

were "good candidates" for such relief, which would, if granted, result in their permanent resident status.

Aside from the obvious practical difficulties in attempting to perfect an appeal from a foreign country, the fact that the warrant of deportation was executed two days following the hearing, well within the ten-day appeal period normally granted (*see* 8 C.F.R. § 242.21), the deportation had other effects, as well. First, 8 U.S.C. § 1105a purports to preclude any appeal, once the alien has "departed" from the United States (*but see Mendez v. INS, supra*). Second, the defendants' deportation interrupted their prior continuous stay in the United States, so as to make them seemingly now ineligible for suspension of deportation. *See* 8 U.S.C. § 1254(a).

Neither of the defendants in this case has proved that he is, or was, eligible for a suspension of deportation prior to the actual deportations which took place on November 1, 1984. According to the Nagy affidavit, that information could not be known for some time after an application, which now appears to be foreclosed to these defendants. Her opinion, however, that these defendants "would have been good candidates for suspension of deportation and, in my opinion, any competent attorney would have advised them to week [sic] that relief," is unchallenged by the government. This situation is much like that pointed out by the defendants in the case of *Partible v. INS, supra,* where relief was granted the alien in a civil appeal.

In *United States v. Rangel-Gonzales,* 617 F.2d 529 (9th Cir. 1980), the court was faced with a defendant's attempt to show prejudice from the failure of the INS to abide by 8 C.F.R. § 242.2(e) in his prior deportation proceeding which formed the basis of his § 1326 prosecution, having earlier remanded that question to the district court for a special hearing. *Calderon-Medina, supra.* The court had earlier held that the regulation in question, which required the INS to advise the respondent of his right to consult

with Mexican Consular authorities, served a purpose beneficial to the alien but that it would invalidate the deportation only if the alien could show prejudice to interests protected by the regulation. 591 F.2d at 531. The court had ruled that such prejudice would be shown if the violation of the regulation "harmed the aliens' interest in such a way as to affect potentially the outcome of their deportation proceedings." 591 F.2d at 532. On appeal after remand the circuit court reversed the district court's refusal to dismiss the indictment, concluding that the defendant's affidavits were sufficient to find prejudice. Those affidavits sought to demonstrate that, had he been advised of the opportunity, the alien would have called the Mexican Consulate, who would, in turn, have assisted him in seeking help from friends or an attorney, and that with appropriate assistance from an attorney, he might have obtained voluntary departure rather than deportation. The court concluded that the defendant had shown "some likelihood" that the outcome of his deportation hearing would have been "materially affected" had the regulation been followed. 617 F.2d at 531.

The record in this case is less complete to be sure. Nevertheless, as discussed above, the tape recording of the deportation hearing itself demonstrates amply that these defendants did not understand the consequences of the choices that they were forced to make, and that had they been fully aware of such consequences, there is not only "some likelihood" but a substantial likelihood that the result of the hearing would have been "materially affected." I therefore conclude that the defendants have demonstrated prejudice from the failure of the Immigration Law Judge to fully comply with the provisions of 8 C.F.R. § 242.17.

Due process includes the concept of fundamental fairness. My review of the deportation proceedings in these cases leads me to the unhappy conclusion that even

though the Immigration Law Judge might have technically complied with the specific requirements in the regulations, his failure to overcome these defendants' lack of understanding about the proceedings, which is apparent from listening to the tape recording, totally undermined the reliability of the proceedings. I am left with the distinct impression that substantial justice was not done. I cannot, therefore, allow the deportation orders to stand as a material element forming the basis of charges against these defendants pursuant to 8 U.S.C. § 1326.

IT THEREFORE HEREBY IS ORDERED, the indictments in both of these cases are hereby dismissed.

Dated February 28, 1985.

BY THE COURT

/s/ WARREN K. URBOM

Warren K. Urbom
Chief Judge

APPENDIX C

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR85-L-07

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JOSE MENDOZA-LOPEZ, DEFENDANT.

ORDER OF DISMISSAL

In accordance with the accompanying memorandum, IT IS ORDERED that the indictment is dismissed. Dated February 28, 1985.

FOR THE COURT

/s/ WARREN K. URBOM
Warren K. Urbom
Chief Judge

APPENDIX D

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR85-L-06

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ANGEL LANDEROS-QUINONES, DEFENDANT.

ORDER OF DISMISSAL

In accordance with the accompanying memorandum, IT IS ORDERED that the indictment is dismissed. Dated February 28, 1985.

FOR THE COURT

/s/ WARREN K. URBOM

Warren K. Urbom
Chief Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 85-1436/1437-NE

UNITED STATES OF AMERICA, APPELLANT,

vs.

JOSE MENDOZA-LOPEZ, APPELLEE.

Appeals from the United States District Court for the District of Nebraska.

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 18, 1986

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